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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Pamela Ann Wood, a married woman filing
individually,

Plaintiff,

v.

University Physicians Healthcare, an
Arizona corporation,

Defendant.

No. CV-13-00063-PHX-JAT

ORDER

Pending before the Court is Defendant University Physicians Healthcare's ("UPH") Motion for Judgment on the Pleadings Re: Counts I, IV, and VI of Plaintiff's Complaint under Federal Rule of Civil Procedure 12(c) and the parties' Stipulated Motion to Dismiss Counts I and VI of Plaintiff's Complaint with Prejudice.

I. Background

Plaintiff Pamela Ann Wood ("Wood"), a previous employee of UPH, has brought the present action against UPH alleging intentional infliction of emotional distress, negligent infliction of emotional distress,¹ disability discrimination under the Americans with Disabilities Act, constructive discharge, retaliation, and defamation. In the pending motions, the parties have stipulated to the dismissal of Wood's claims for intentional infliction of emotional distress and defamation (Counts I and VI). UPH also seeks to dismiss Wood's claim constructive discharge (Count IV). Wood has alleged (Doc. 1-1)

¹ Wood has already voluntarily dismissed her negligent infliction of emotional distress claim. (Doc. 11).

1 the following facts in her Complaint.²

2 In the late 1990's, Wood was diagnosed with Crohn's disease. (*Id.* ¶ 8). Crohn's
3 disease is an incurable chronic disease of the intestinal tract that can cause pain, diarrhea,
4 weight loss, bleeding, fevers, and fatigue. (*Id.*). The symptoms of Crohn's disease vary
5 in intensity, but stress can cause flair ups. (*Id.*).

6 In September 2008, UPH hired Wood as a case manager. (*Id.* ¶ 6). For the first
7 three months of Wood's employment, she was supervised by Deb Keller. (*Id.* ¶ 9). Ms.
8 Keller was then promoted to "Director," and Martha Rodriguez supervised Wood. (*Id.*).

9 Shortly after being hired, the Mayo Clinic accepted Wood for treatment of her
10 Crohn's disease. (*Id.* ¶ 10). Wood then informed Ms. Keller of her chronic illness for the
11 first time. (*Id.* ¶ 11). Further, Wood explained that she may have to miss work for
12 doctor's appointments. (*Id.*).

13 In fall of 2008, Ms. Keller completed an unfavorable "impromptu review" of
14 Wood. (*Id.* ¶ 12). Following the review, Ms. Keller told Wood that she had discussed
15 Wood's medical condition with the UPH "Medical Director" and that they felt that Wood
16 should take a lesser position. (*Id.*). Wood did not give Ms. Keller permission to discuss
17 her medical history with anyone. (*Id.*). Wood was also informed that she would be
18 unable to work from home. (*Id.* ¶ 13). Previously, during her hiring interview, Wood had
19 been informed that she would be able to work from home. (*Id.*). Further, other
20 employees of UPH were able to work from home. (*Id.*).

21 After Ms. Keller's promotion, Wood was responsible for training two new case
22 managers. (*Id.* ¶¶ 14,15). One of these new case managers, Dyana Cairns, was absent
23 from work six times without reprimand within the "first months" of her employment. (*Id.*
24 ¶ 14). Ms. Cairns' absences exceeded Wood's absences due to doctor's appointments "in
25 any given month." (*Id.*). The second case manager, Margarita Wellman, was receiving a
26 higher wage than Wood despite the fact that Wood was training her. (*Id.* ¶ 15).

27
28 ² The Court construes all facts alleged in the Complaint in the light most favorable
to the drafter. *See Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

1 Shortly after learning that Ms. Wellman was receiving a higher wage, Wood
2 reported her concerns to her supervisor, Ms. Rodriguez. (*Id.* ¶ 16). Ms. Rodriguez
3 informed Wood that she had talked with Ms. Keller about Wood's concerns and that
4 nothing was going to change. (*Id.*) She also told Wood to "not get upset, you'll make
5 yourself sick." (*Id.*)

6 A few days later, Wood called the UPH ethics and compliance hotline to report the
7 pay discrepancies and the harassment concerning Wood's doctor's appointments. (*Id.*
8 ¶ 17). Wood obtained the hotline number from a break room poster that assured there
9 would be no retaliation for calling. (*Id.*)

10 On August 24, 2009, Wood met with Ms. Keller to discuss her concerns. (*Id.* ¶
11 19). Ms. Keller stated that Wood's illness was affecting her work, including the time that
12 she had missed for doctor's appointments. (*Id.*) Ms. Keller requested that Wood take a
13 form to her doctor. (*Id.*) Wood's doctor could then fill out the form with how much
14 work Wood was going to miss and what accommodations Wood might need. (*Id.*) Ms.
15 Keller also requested that Wood take a copy of her position description to her doctor to
16 help her doctor to fill out the form. (*Id.*) Finally, Ms. Keller required Wood to attend a
17 weekly one-on-one meeting with her supervisor because she called the ethics hotline and
18 "failed to follow the chain of command." (*Id.*) Rather than comply with Ms. Keller's
19 request, Wood gave three weeks' notice and then resigned her employment. (*Id.* ¶ 20).

20 **II. Legal Standard**

21 Federal Rule of Civil Procedure ("Rule") 12(c) is "functionally identical" to Rule
22 12(b)(6). The same legal standard therefore applies to motions brought under either rule.
23 *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011);
24 *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) ("The principal
25 difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of
26 filing. Because the motions are functionally identical, the same standard of review
27 applicable to a Rule 12(b) motion applies to its Rule 12(c) analog.").

28 The standard for deciding Rule 12(b)(6) and Rule 12(c) is established in the

1 Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and
2 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).³ To survive a motion for failure to state a claim,
3 a complaint must meet the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a "short
4 and plain statement of the claim showing that the pleader is entitled to relief," so that the
5 defendant has "fair notice of what the . . . claim is and the grounds upon which it rests."
6 *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

7 Although a complaint attacked for failure to state a claim does not need detailed
8 factual allegations, the pleader's obligation to provide the grounds for relief requires
9 "more than labels and conclusions, and a formulaic recitation of the elements of a cause
10 of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual
11 allegations of the complaint must be sufficient to raise a right to relief above a
12 speculative level. *Id.* Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion,
13 of entitlement to relief. Without some factual allegation in the complaint, it is hard to see
14 how a claimant could satisfy the requirement of providing not only 'fair notice' of the
15 nature of the claim, but also 'grounds' on which the claim rests." *Id.* (citing 5 C. Wright
16 & A. Miller, *Federal Practice and Procedure* § 1202, pp. 94, 95 (3d ed. 2004)).

17 Rule 8's pleading standard demands more than "an unadorned, the-defendant-
18 unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at
19 555). A complaint that offers nothing more than naked assertions will not suffice. To
20 survive a motion to dismiss, a complaint must contain sufficient factual matter, which, if
21 accepted as true, states a claim to relief that is "plausible on its face." *Iqbal*, 556 U.S. at
22 677. Facial plausibility exists if the pleader pleads factual content that allows the court to
23 draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*
24 Plausibility does not equal "probability," but plausibility requires more than a sheer
25 possibility that a defendant has acted unlawfully. *Id.* "Where a complaint pleads facts
26 that are 'merely consistent' with a defendant's liability, it 'stops short of the line between
27

28 ³ The Ninth Circuit has applied *Iqbal* to Rule 12(c) Motions. *Cafasso*, 637 F.3d at
1055 n.4.

possibility and plausibility of entitlement to relief.’ ” *Id.* (citing *Twombly*, 550 U.S. at 557).

In deciding a motion to dismiss, the Court must construe the facts alleged in the complaint in the light most favorable to the drafter of the complaint and must accept all well-pleaded factual allegations as true. *See Shwarz*, 234 F.3d at 435. Nonetheless, the Court does not have to accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The Court may dismiss a complaint for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; and (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

III. Analysis

The parties have already stipulated to the dismissal of Counts I and VI. Thus, UPH’s motion for judgment on the pleadings on Counts I and VI is denied as moot. The Court will thus examine the only remaining count addressed by UPH’s motion for judgment on the pleadings, Count IV.

A. Count IV, Constructive Discharge

UPH argues that Wood has failed to allege a successful constructive discharge claim because constructive discharge is not an independent cause of action under Arizona law. (Doc. 13 at 8–12). In particular, UPH contends that Arizona’s constructive discharge statute, A.R.S. § 23-1502, does not create a cause of action distinct from Arizona’s wrongful termination statute, A.R.S. § 23-1501. (*Id.* at 8–9). Instead, UPH argues that A.R.S. § 23-1502 allows employees to assert a wrongful termination action when they have not been expressly fired. (*Id.* at 9). UPH asserts that Wood has failed to allege a cause of action under A.R.S. § 23-1501 and thus cannot allege a violation of A.R.S. § 23-1502. (*Id.* at 12).

In response, Wood argues that Arizona courts have recognized constructive discharge as a separate cause of action. (Doc. 17 at 6–7). But, if the Court is not persuaded by this argument, Wood asks for leave to amend her complaint to include an

1 Arizona statutory cause of action. (*Id.* at 7).

2 A.R.S. § 23-1502 provides that “[i]n any action under the statutes of this state or
3 under common law, constructive discharge may only be established by either”: (1)
4 “[e]vidence of objectively difficult or unpleasant working conditions to the extent that a
5 reasonable employee would feel compelled to resign”; or (2) “[e]vidence of outrageous
6 conduct by the employer or a managing agent of the employer, . . . if the conduct would
7 cause a reasonable employee to feel compelled to resign.” If the employee alleged
8 “objectively difficult or unpleasant working conditions,” the employee must also comply
9 with the procedural requirements of A.R.S. § 23-1502(B), which largely consist of fifteen
10 days written notice to the employer.

11 As an initial matter, the statutory text refutes UPH’s argument that a constructive
12 discharge action *must* be based in an underlying wrongful discharge action under A.R.S.
13 § 23-1501. The statute explicitly contemplates that constructive discharge can be
14 established “in any action under the *statutes of this state or under common law.*” A.R.S.
15 § 23-1501 (emphasis added). Thus, constructive discharge is clearly available to
16 plaintiffs alleging violations of law other than A.R.S. § 23-1501, *i.e.*, common law causes
17 of action. Further, “statutes of this state” implies that multiple state statutes could form
18 the basis of the claim. This understanding of the statute is in accord with Arizona case
19 law. *See Barth v. Cochise Cnty., Arizona*, 138 P.3d 1186, 1189 ¶ 11 (Ariz. Ct. App.
20 2006) (examining the procedural requirements of a constructive discharge claim when
21 wrongful termination was not alleged).

22 But, the fact that A.R.S. § 23-1502 is distinct from wrongful termination under
23 A.R.S. § 23-1501 does not necessarily mean that A.R.S. § 23-1502 creates a truly
24 independent cause of action, *i.e.*, that constructive discharge can be alleged without any
25 other claims. On the one hand, the statutory language appears to subordinate constructive
26 discharge claims to actions under state statutes or common law. A.R.S. § 23-1502 (“[i]n
27 any action under the statutes of this state or under common law, constructive discharge
28 may only be established by either . . .”). Further, A.R.S. § 23-1502 does not specify any

1 remedy for constructive discharge, which is typically required in an independent tort.
2 Finally, for comparison, the federal law doctrine of constructive discharge is not a cause
3 of action in its own right. *See Penn. State Police v. Suders*, 542 U.S. 129, 141 (“Under
4 the constructive discharge doctrine, an employee’s reasonable decision to resign because
5 of unendurable working conditions is assimilated to a formal discharge for remedial
6 purposes.”)

7 On the other hand, Arizona courts have discussed A.R.S. § 23-1502 constructive
8 discharge as if it were a separate cause of action. *See Barth*, 138 P.3d at 1189 ¶ 11
9 (stating that A.R.S. § 23-1502 “sets out the procedural requirements for bringing a
10 constructive discharge action”).⁴ Further, the Revised Arizona Jury Instructions (Civil)
11 provides a model jury instruction for A.R.S. § 23-1502 constructive discharge, though it
12 notes that “[t]here is an active debate among labor and employment practitioners as to
13 whether constructive discharge is an independently actionable cause of action.” Revised
14 Arizona Jury Instructions (Civil), Employment Law Instructions 11 (4th ed. rev. 2005).

15 Here, Wood has asked for leave to amend her complaint to include a charge under
16 a “similar state statute” in Arizona to her “Title VII” claim. (Doc. 17 at 7). Assumedly,
17 Wood means to amend her complaint to bring a claim under Arizona Civil Rights Act
18 (“ACRA”), A.R.S. §§ 41-1401 through 1492. In an abundance of caution, the Court will
19 allow leave to amend.⁵ In her amended complaint, Wood should make clear whether she
20 is alleging constructive discharge as part of her ACRA claim or as a completely separate
21 cause of action. If Wood chooses to bring constructive discharge as an independent
22

23 ⁴ This Court has also discussed A.R.S. § 23-1502 constructive discharge as if it
24 were a separate cause of action, without expressly deciding so. *See Biggs v. Town of*
25 *Gilbert*, CV11-330-PHX-JAT, 2012 WL 94566 at **8–9 (D. Ariz. Jan. 12, 2012)
(dismissing a constructive discharge claim for failing to meet the procedural
requirements).

26 ⁵ UPH argues that any leave to amend to include an ACRA claim would be futile
27 because only a claim under A.R.S. § 23-1501 can support a constructive discharge claim
28 and claims under the ACRA are distinct from claims under A.R.S. § 23-1501. (Doc. 18
at 6–7). As already explained, the Court has determined that, even if constructive
discharge is not an independent cause of action, A.R.S. § 23-1501 is not the sole basis for
supporting a constructive discharge claim.

1 cause of action, UPH can file a new motion on this issue. Accordingly, at this time, the
 2 Court will not decide whether A.R.S. § 23-1502 constructive discharge is an independent
 3 cause of action.

4 **III. Conclusion**

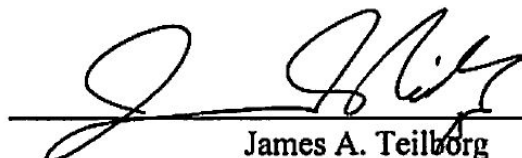
5 Based on the foregoing,

6 **IT IS ORDERED** that the parties' Stipulated Motion to Dismiss Counts I and VI
 7 of Plaintiff's Complaint with Prejudice (Doc. 44) is granted. Counts I and VI are
 8 dismissed with prejudice.

9 **IT IS FURTHER ORDERED** that UPH's Motion for Judgment on the Pleadings
 10 Re: Counts I, IV, and VI of Plaintiff's Complaint (Doc. 13) is granted in part and denied
 11 in part. With respect to Counts I and VI, the motion is denied as moot. With respect to
 12 Count IV, Plaintiff's request to amend her Complaint to include a claim under the ACRA
 13 is granted (Doc. 17). Plaintiff must file an amended complaint within 14 days of the date
 14 of this order. If Plaintiff fails to file the amended complaint to clarify her constructive
 15 discharge theory of Count IV, the Court will deem Count IV to be abandoned and
 16 dismissed as a result of this Order (the case will still then proceed on the currently filed
 17 complaint consistent with this Order). Because the amended complaint supersedes the
 18 original complaint, Plaintiff must replead all causes of action in the amended complaint
 19 except for the Counts already dismissed by this Court.⁶

20 **IT IS FURTHER ORDERED** that the dispositive motion deadline is extended to
 21 January 10, 2014.

22 Dated this 21st day of November, 2013.

23
 24
 25 
 26 **James A. Teilborg**
 27 **Senior United States District Judge**

28

⁶ See *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).